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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1972

No. 72-509

HUGO DiPAOLO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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In The

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October Term 1972

No. 72-

HUGO DI PAOLO,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

Statement

Petitioner, HUGO DI PAOLO, prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York rendered the 6th day of July 1972, affirming the order of the Supreme Court of the State of New York, Appellate Division, First Department, which in turn had modified and affirmed the judgment of the Supreme Court, Bronx County, convicting petitioner of the crimes of violating the gambling

laws of New York (Penal Law, §§225.10, subd. 2(a), 225.20, 225.05 and 225.15), after trial before Sandifer, J., and a jury.

Opinion Below

The Court of Appeals affirmed without opinion, but the Appellate Division affirmed with a modification of sentence, namely from four to three years imprisonment, over a dissenting opinion by Justice Murphy (see Appendix).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Court of Appeals affirmed on July 6, 1972.

Questions Presented

1. Whether petitioner was deprived of his Fourth Amendment rights when his home was invaded by a detective in plainclothes sans a search or arrest warrant (Fourth Amendment)?

2. Whether in the circumstances, a so-called "dropsy" gambling arrest was believable as a matter of law in view of a detective's testimony that DI PAOLO dropped a steno pad as he was entering his apartment, which pad supposedly contained incriminating references to a gambling operation and was the justification for the alleged warrantless search and arrest inside the apartment?

3. Whether a failure to elicit a waiver of Miranda rights from petitioner, while he was in

custody, precluded the use of an allegedly incriminating statement obtained from him after his arrest (Fifth, Sixth, and Fourteenth Amendments)?

4. Whether the prosecutor's remarks charging petitioner with having committed a crime by failing to pay income taxes, a fact not proved nor part of the evidence, violated DI PAOLO's Fifth and Fourteenth Amendment rights against self-incrimination?

5. Whether the prejudicial remarks by the prosecutor, accusing DI PAOLO of bilking poor people and depriving schools, hospitals and other institutions of funds, coupled with adversions to his alleged connection with organized crime, precluded a fair trial (Fourteenth Amendment)?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as Penal Law, Sections 225.10, subd. 2(a), 225.20, 225.05, and 225.15, are involved herein.

Statement of the Case

Introductory

On the 4th day of April, 1969, a number of detectives of the New York City Police Department indiscriminately eavesdropped at the portals of a number of apartments in a building which also housed the apartment in which petitioner dwelled.

The prosecution at trial declared that this surreptitious activity had been aimed at securing sufficient evidence so that it might be possible to convince a Magistrate that a search warrant was justified. The object of this rummaging investigation and clandestine eavesdropping was allegedly a person known as "Totoro."

It is undisputed that at this juncture the police had no search or arrest warrants and that an invasion of privacy was afoot. A detective by the name of Fitzpatrick had testified that after unsuccessfully eavesdropping at a number of apartments, he spotted DI PAOLO walking out of apartment 3C carrying a stenographer's pad containing notations which later turned out to represent a week's wages on mutuel racehorse policy.

Although Fitzpatrick was garbed in ordinary street clothes, thus masking his identity as a law enforcement officer, he declared that DI PAOLO nevertheless threw away this highly incriminating steno pad upon spotting the detective and immediately retreated into his abode, that is, his apartment.

The detective insisted that not only was he able to retrieve the steno pad, but was also able to peruse it, determine that it contained mutuel racehorse policy bets, and also had enough time left to intercept DI PAOLO before he could slam the door to his apartment.

The person known as "Totoro" was, coincidentally, inside the apartment, as well as was a third individual.

Only DI PAOLO was brought to trial on two felony and two misdemeanor counts.

It is submitted that the steno pad proved insufficient to warrant conviction of the criminal charges as against DI PAOLO without the utilization by the prosecutor of an allegedly highly incriminating statement uttered by DI PAOLO that he had paid the rent for the apartment and had been domiciled therein for some period of time.

The Miranda hearing conducted during the trial clearly discloses that the prosecution completely failed in their quest to demonstrate that DI PAOLO had knowingly and intelligently waived his rights prior to issuing his statement. There can be no doubt that Detective Fitzpatrick had conducted a custodial interrogation of DI PAOLO specifically aimed at eliciting testimony regarding petitioner's possessory dominion of the apartment.

It appeared that the police had failed to properly mark and safeguard the items seized from the dwelling. Moreover, they failed in establishing a chain of ownership or custodial possession which would establish that the items used in Court were in effect the self-same articles seized from the apartment.

We take a similar position to that which petitioner advanced in the Court below concerning the errors which precluded a fair trial. These included the remarks of the prosecutor adverting to organized criminal behavior and the alleged bilking of poor people of Bronx County, together with exhortation by the District Attorney to the

jurors to protect the interests of their community. The prosecutor further injected his own personal reputation in order to put the "mark of Cain" upon DI PAOLO as a high echelon organized mobster. The speculation by The People as to the yearly range of the policy racket completely exceeded the bounds of propriety and of the indictment.

The jury was unquestionably placed in a position where they were more concerned about the policy business as such rather than the specific charges in the case at bar. The Trial Court compounded the prejudice by unwarranted utterances to the jury indicating his belief that this case was "the simplest case I ever tried since I've been sitting in the Supreme Court."

The Trial Judge made a "chinese puzzle" out of the burden of proof by seeking to proselytize the jury into believing that the credibility of the two police officers was the main issue. Actually there were a number of other issues. It was unfair for the Judge to have indicated that believing the police witnesses would be tantamount to proof beyond a reasonable doubt.

We recognize further that this Court is a court of last resort and, while it may well be that the respondent will argue that specific objections were not always voiced by trial counsel, it is submitted that the overall requirements of due process enable this Court to render justice irrespective of the niceties of articulating specific objections to every alleged error. Since there was a Fourth Amendment violation, the omission of precise

objections are not controlling under the "plain error" doctrine.

It should be noted that DI PAOLO served 11 months time prior to his release on bail as a result of the dissenting opinion of Justice Murphy of the Appellate Division, First Department, concurred in by Justice McGivern, J.P.

Factual Background.

On April 4, 1969, three Bronx detectives who were actively engaged in an investigation into the gambling activities of a man named Totoro, followed that individual to Crotona Avenue in Bronx County; and, at that location observed Totoro alight from his automobile and enter 2465 Crotona Avenue (Fitzpatrick, A22, 102-103, 120-121; Hughes, A197).* In connection with that phase of the investigation, five detectives congregated in a motel in the area and formulated a plan through which they allegedly intended to acquire evidence to be used in order to procure a warrant permitting a search of Totoro. After formulating their course of action, several of the officers entered 2465 Crotona Avenue through the front door while the others gained entrance to the building by descending from the roof, a vantage point they had achieved by going over the roof of an adjoining building. Additionally, to aid them in their projected course of action several of the detectives were in possession of walkie talkies to enable them to communicate with the other members of the strike force

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* Numerals in parentheses preceded by the prefix "A" refers to the Appendix of Petitioner in The Court below.

(Fitzpatrick, A91-92, 103-104; Hughes, A192-198, 200-202). Although the prime object of their investigation, the individual named Totoro, was alleged not to have been observed entering any particular apartment in that building, the group of detectives who were conducting the investigation nevertheless initiated an attempt to gather evidence regarding him. And, although they had no search warrant in their possession and the avowed purpose of their entry into the building in such an organized fashion was to gather evidence to support a search warrant concerning Totoro, this squad of experienced detectives initiated what might be deemed a rather unorthodox course of action (Fitzpatrick, A89, 103, 106). Since they had no way of knowing which apartment was the one Totoro had entered and the purported reason for their presence was to obtain a factual underpinning for a search warrant, the detectives resorted to the device of physically eavesdropping at doors to the apartments in that building as the means by which they sought to acquire the evidence they desired (Fitzpatrick, A119-122); despite the obvious fact that any evidence acquired in this fashion would be clearly unconstitutional and could not possibly have served as the basis for a search warrant.

Fitzpatrick had spent some 20 minutes listening at doors on the upper floors of the building, apparently to no avail and as he was descending the stairwell, approaching the 3rd floor, DI PAOLO fortuitously happened to then walk out of apartment 3C (Fitzpatrick, A22-23, 96-98, 100-101). Thereupon, although Fitzpatrick was dressed in plain clothes and, in his own words, was attempting to appear inconspicuous, when DiPaolo saw

him, he was somehow impelled to drop a steno pad which he was purportedly holding in his hand to the ground, and then turned and attempted to run back to the apartment from which he had come. And, although Fitzpatrick was some 10-15 feet from DI PAOLO when the pad was dropped and DI PAOLO was only some five feet from the door of the apartment, Fitzpatrick testified that he was able to retrieve the steno pad, look at it so as to ascertain that it contained policy notations and then was also able to intercept DI PAOLO before defendant was able to close the door of the apartment (Fitzpatrick, A22-26, 48-50, 96, 97-99, 100-101). Fitzpatrick placed DI PAOLO under arrest at the threshhold of the apartment and then entered the apartment where he observed two other individuals; the individual they had followed to the building, Totoro, was in the living room of the apartment seated in a chair watching television and another individual by the name of Morello was in the hallway of the apartment (Fitzpatrick, A27, 113-115). After placing DI PAOLO under arrest, Detective Fitzpatrick searched him thereby learning his name and address which were on his driver's license. Thereupon, Fitzpatrick saw fit to warn him of his rights to remain silent, to have counsel as well as the fact that anything he said could be used against him; however, Fitzpatrick never indicated at the Miranda hearing conducted at the trial that DI PAOLO had comprehended these warnings or that he was prepared in any way to waive his rights. After the warnings were given DI PAOLO was interrogated about his ownership of the apartment and admitted to Fitzpatrick that the apartment was his, that he paid the rent and

that he had been living there for some time (Fitzpatrick, A67-69). While Fitzpatrick testified at trial that prior to procuring the admissions from DI PAOLO about his ownership of the apartment he had searched him and had found a driver's license bearing the address, 2465 Crotona Avenue, that document was never introduced into evidence nor was there any testimonial indication that it bore any apartment number whatsoever (Fitzpatrick, A54-55, 68).

A search of the apartment uncovered, on the kitchen table, 30 sheets of paper and a brown paper bag containing nine white envelopes, two steno pads and some carbon paper. These various items of evidence which were found on the kitchen table were subsequently described by both Detectives Hughes and Fitzpatrick as constituting both collectors' slips as well as bankers' slips spelling out over ten thousand wagers on Mutuel Race Horse policy. With respect to the steno pad which DI PAOLO allegedly dropped to the ground, the pages therein were characterized as banker's slips and the notations thereon corresponded with some of the notations on the collectors' slips found on the kitchen table (Hughes, A126-132, 142). However, no testimony was offered as to how many separate plays were represented by the pad DI PAOLO had dropped to the ground. All of the evidence was placed in a shopping bag by Detective Fitzpatrick and several hours after the arrest that shopping bag was placed in a room at the 46th precinct in the Bronx. No identifying notations whatsoever were made on any of the items of evidence seized in that apartment. The evidence was left in the 46th precinct, a place

where many police officers had access to it for some 15 hours, before Fitzpatrick picked it up the following day and deposited it in the policy property clerk's office (Fitzpatrick, A35-51, 71-78, 84-86, 88).

Argument

Point I

PETITIONER DI PAOLO WAS ARRESTED AS A RESULT OF AN UNLAWFUL INVASION OF PRIVACY WHICH INCLUDED THE SEIZING OF PERSONAL PROPERTY WITHOUT AN ARREST OR SEARCH WARRANT, COUPLED WITH AN UNAUTHORIZED INVASION OF HIS DWELLING.

It may well be hackneyed to recall the platitudes of our common law ancestors such as the famous speech by the elder Pitt on the Excise where he declared:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenement."

Lord Coke referred to the privacy of one's home by saying "The house of every one is to him as his fortress, as well for his defense against injury and violence as for his repose."

In the case at bar, the petitioner was clearly the victim of an unauthorized invasion of privacy and it cannot be denied that his Fourth Amendment rights were traduced.

The police were embarked upon a calculated invasion of privacy by admittedly eavesdropping at the portals of a number of apartments trying to secure evidence of the possible commission of a crime in order to satisfy a Magistrate, if asked to issue a search warrant. The police, including Detective Fitzpatrick who made the arrest, were well aware of the requirements of the Fourth Amendment and were also cognizant of their need to obtain the proper search warrants before invading anyone's privacy.

Despite this, the police officer (Fitzpatrick) offered the palpably unbelievable testimony that he saw the petitioner drop a steno pad, was able to retrieve it and peruse it with sufficient time left over to evaluate the fact that it contained evidence of illegal betting on mutuel racehorse policy and, moreover, permitted him to effectuate an arrest of petitioner before he could even slam the door.

It is submitted that the mere articulation of such evidence is sufficient to brand it as manifestly incredible and, for that reason alone, a reversal is warranted.

If the detective had seized the book and nothing else, we would contend that a violation of the Fourth Amendment had ipso facto occurred. This fact however, coupled with the brazen invasion of DI PAOLO's apartment and the subsequent rummaging search therein, to say nothing of his arrest, was flagrant violation of the Fourth, Fifth, Sixth and Fourteenth Amendments.

The detectives had no search warrant although they recognized the need for one. This was the main reason for their eavesdropping in the first place. In their desire however, to ride roughshod over the rights of petitioner, they threw caution to the wind and conducted their search and seizure and effectuated their arrest without the benefit of any Court order.

In referring to the Fourth Amendment, Justice Frankfurter expressed this attitude as follows (HARRIS v. UNITED STATES, 331 U.S. 145 (1947):

> "Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any other single factor gave rise to American Independence. * * * "

This Court has aptly referred to an invasion of privacy as anathema to the Fourth Amendment without proper warrants (DAVIS v. UNITED STATES, 328 U.S. 582 [1945]; MC DONALD v. UNITED STATES, 335 U.S. 451 [1948]; and WOLF v. COLORADO, 338 U.S. 25 [1949]).

In COHEN v. NORRIS, 9 Cir. 1962, 300 F.2d 24, the Court summed up these principles as follows:

> "The security of one's privacy against arbitrary intrusion by the police is 'at the core of the Fourth Amendment * * *.' Wolf v. People of State of Colorado, 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782. An intrusion by the police in the

> form of a search and seizure is arbitrary, and therefore 'unreasonable,' if not authorized by law. * * *"

In BOYD v. UNITED STATES, 116 U.S. 616, cited with approval by this Court in COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443, 29 L.Ed.2d 564, this Court aptly observed, concerning the Fourth Amendment (id at 116 U.S. 635):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rules that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In COOLIDGE itself this Court recently declared:

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore

implicit in 'the concept of ordered liberty' and as such are enforcible against the States through the Due Process Clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law, solely on the authority of the police, did not need the commentary of recent history to be condemned...."

Point II

THE CONVICTION OF THE PETITIONER WAS SUBSTANTIALLY PREDICATED UPON AN ALLEGED INCRIMINATING STATEMENT WHICH HE UTTERED CONCEDING DOMINION OVER THE APARTMENT IN QUESTION AND HIS PROTRACTED RESIDENCE THEREIN. THE STATEMENT WAS OBTAINED WITHOUT AFFIRMATIVE PROOF THAT DI PAOLO HAD WAIVED HIS MIRANDA RIGHTS.

Detective Fitzpatrick, after effectuating an unlawful arrest and unconstitutional seizure, allegedly obtained information from petitioner while he was in custody without having established a waiver of his rights under MIRANDA v. ARIZONA, 384 U.S. 436 (1966). While it is true that Fitzpatrick declared that he articulated the Miranda warnings, there was no evidence adduced that DI PAOLO either understood the significance thereof, or that if he did, that he decided to waive those rights. This Court has declared that a waiver of rights, particularly of constitutional dimension, ought never be presumed but that on the contrary, a strong presumption against waiver subsists. The

burden rests upon the prosecutorial agency to prove waiver since no presumption of waiver exists. Thus in MIRANDA v. ARIZONA, supra, 384 U.S. at 475, the Court explained:

> "This court has always set high standards of proof for the waiver of constitutional rights ... and we reassert those standards as applied to in custody interrogations. Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogations, the burden is rightly on its shoulders."

In COOLIDGE v. NEW HAMPSHIRE, supra, this Court further explained:

> "It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of our system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then 'the exceptions cannot be enthroned into the rule.'"

The evidence, therefore, obtained from DI PAOLO, was in violation of his constitutional rights, both with respect to the search and seizure

under the Fourth Amendment and the improper statements under the Fifth, Sixth and Fourteenth Amendments. The evidence therefore was tainted.

In MESAROSH v. UNITED STATES, 352 U.S. 1, the Supreme Court ruled (id at 9, 14):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.... This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.... ['T]he untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts.... The government of a strong and free nation does not need convictions based upon such testimony.'"

Point III

THE PETITIONER WAS DENIED A FAIR TRIAL BECAUSE OF PREJUDICIAL STATEMENTS IN SUMMATION BY THE PROSECUTOR WHICH IMPUNED DI PAOLO WITH THE EMOTIONALLY CHARGED STIGMA OF "ORGANIZED CRIME", AND WENT ON TO DISCUSS IRRELEVANT CONSIDERATIONS OF ALLEGEDLY BILKING HOSPITALS, POOR PERSONS, AND SCHOOLS OF THEIR MONEY. ADDITIONALLY, THE PROSECUTOR VIOLATED DI PAOLO'S FIFTH AMENDMENT RIGHTS BY ACCUSING HIM OF FAILING TO PAY INCOME TAXES (A CRIME) ALTHOUGH HE NEVER TOOK THE STAND AND THE ISSUE WAS NOT GERMANE TO THE CASE.

The prosecutor herein was of course anxious to project his own personality and, if possible, to win his case. Unfortunately, in doing so, he made emotional appeals to the jury which included exhortations to convict, not necessarily based upon the evidence, but upon alleged inferences that the petitioner was stealing nickels and dimes from poor people who had 500 to 1 and sometimes 50 to 1 chances of winning. Moreover, the prosecutor argued that this money was not going for schools or hospitals, nor to fight pollution. Objections and exceptions were of course taken. On top of this, the prosecutor declared that DI PAOLO paid no taxes and that he earned between $200,000 and $300,000 a year.

Since there was no evidence concerning whether or not DI PAOLO paid taxes, it was highly improper for The People to even mention this alleged

fact. There was absolutely no indication that DI PAOLO did not pay taxes and it is submitted that since he did not take the stand, this was evidence of a crime which was a violation of his Fifth Amendment right against self-incrimination. The reason for this was that it was an attribution of criminality concerning a matter not within the four corners of the indictment, and unless DI PAOLO took the stand or placed his character in issue, it should not have been elicited or mentioned.

Gambling in New York, such as off-track and para-mutuel, is legal, but the prosecutor did not discuss this aspect.

There was no basis for talking about schools or pollution or whatnot since it was not part of the indictment and was not fair comment.

The prosecutor also subtly referred to "all the Di Paolos in Bronx County" and made illusions to the "organized entity on that street" and so forth. All these comments clearly referred to "organized crime."

(A) The Trial Judge misinformed the jury on the true thrust of proof beyond a reasonable doubt by making his charge depend upon the testimony of Detectives Hughes and Fitzpatrick despite the fact that the jury necessarily had to also consider the seized evidence and DI PAOLO's statement.

The Trial Court made the case too simplistic by indicating that everything turned on whether or not the jury believed Detectives Hughes and Fitz-

patrick and asserted that if they did, the case would have been proved beyond a reasonable doubt. Actually there was a question of the interpretation of the seized steno book and other material as well as the evidence adduced from the detectives.

Conclusion

The Writ of Certiorari should be granted and the Judgment of Conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Opinion of Appellate Division

(37 A.D.2d 823 [1st Dept. 1971])

"McGivern, J.P., Nunez, Kupferman, McNally, JJ.

"Judgment, Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant, after a jury trial, of the crimes of promoting gambling and possession of gambling records and sentencing him to concurrent indeterminate terms of four years in State Prison on the felony counts, modified, in the exercise of discretion, by reducing the sentence to concurrent indeterminate terms of three years in State Prison and said judgment is otherwise affirmed.

"We have examined defendant's probation report and while defendant's record is by no means an exemplary one, we consider the sentence imposed excessive and we reduce it pursuant to the provisions of §543 Code Crim. Pro. (see also CPL §470.15[2][c]). See People v. Kerrigan, 37 A.D.2d 515 mod. on reargument Sept. 30, 1971, A.D.2d.

"We have examined defendant's various claims of prejudicial error but have concluded that in view of the clear evidence of defendant's guilt, such errors did not affect his substantial rights and are, therefore, harmless (§542 Code Crim. Pro.,

see also CPL §470.05[1]).

"All concur except McGivern, J.P. and Murphy, J., who dissent in the following memorandum by Murphy, J.:

"We dissent and would reverse and grant a new trial. The summation of the prosecutor was improper and prejudicial. Specifically, he stated:

> "'Now, gentlemen, I am not going to come here and moralize to you about the evils of gambling * * *.
>
> "'It involves little people, everyday people, betting nickels, dimes and quarters, with the hope that they will hit the winning number. And these are the people, often poor people, reportedly who are being bilked at a policy operation, because his chances, the bettor's chances are a thousand to one, of winning. What does he get in return? Five hundred. Five hundred. Fifty to one. That bettor, he is the gambler. Put his money down. The odds are against him but he is gambling.
>
> "'Mr. DiPaola is no gambler. He is a business man. The policy game is a business. The odds are all in his favor. He wins everyday.
>
> "'What is the effect of this? These individuals are being bilked for those nickels and dimes and quarters every day that this thing runs. And all that money coming in from these individuals is money coming from the most disad-

vantaged neighborhood in New York, Bronx County. And where is all this money going. It's going for schools? Is it going for schools? Is it going for hospitals? Is it going for clean air?

"'Is it going to give real hope to these people that need it the most? Of course it's not. It's going into the pockets of all the DiPaolos in Bronx County. That's where it's going.

"'I said it was a business, and it is a business. But what type of business is it? Pretty nice business. It's a business that has a gross, this particular one, between two-hundred and three-hundred thousand dollars a year. Pays no taxes.

"'There is an organized entity out on that street. And what are they doing? They are flouting and breaking the law every day that the policy operation runs. They are doing it knowingly. They are doing it wilfully. They are doing it intentionally, and why? Because there is big money in it. That's the reason.'

"The aforesaid remarks do not constitute fair comment on the evidence. While the concept conveyed may well be correct, there is nothing in the record to sustain the remarks as they allude to organized gambling. (The defendant was being tried for a particular gambling violation which took place over the course of one day.) Such inferences and the projected results were highly preju-

dicial and inflammatory and effectively denied the defendant a fair trial. People v. Slaughter, 28 A.D.2d 1082. Further, the Court's equating the defendant's guilt or innocence to the belief or disbelief of the detectives was an oversimplification of the law, and in effect directed a verdict against the defendant. People v. Kachadourian, 116 N.Y.S.2d 486, 489. This occurred when the jury had already returned twice to announce that they could not reach a verdict. The absence of timely objections or exceptions may be overlooked and does not deprive the defendant of appellate review in the interests of justice. People v. Woods, 30 A.D.2d 667, appeal dismissed 25 N.Y.2d 786.

"Moreover, a maximum sentence of four years was excessive in a gambling case of this nature."

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Richardson on Evidence 8

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-509

HUGO DIPAOLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered July 6, 1972 [30 N.Y. 2d 962], affirming an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered October 19, 1971, reducing petitioner's sentence from four to three years, but otherwise affirming, with both majority and dissenting memoranda opinions [37 A.D. 2d 823, 325 N.Y.S. 2d 190 (1971)] a judgment of the Supreme Court, Bronx County, rendered February 5, 1971, convicting the petitioner, after

a jury trial, of the crimes of Promoting Gambling in the First Degree [New York Penal Law §225.10(2)(a)], Possession of Gambling Records in the First Degree [*id.* §225.20(2)], Promoting Gambling in the Second Degree [*id.* §225.05] and Possession of Gambling Records in the Second Degree [*id.* §225.15], and sentencing him to State Prison for concurrent indeterminate terms of up to four years on the felony counts and an unconditional discharge as to the other two counts.

Upon information and belief petitioner is presently at liberty pending the termination of this application.

Questions Presented

There are no substantial federal questions in this case.

Statement of the Case

On April 4, 1969, Detectives John Fitzpatrick and Alfred Hughes of the New York City Police Department, another detective and several patrolmen, in the course of an investigation into gambling activity, had occasion to enter premises 2465 Crotona Avenue in the Bronx (21-22).* At about 4:50 p.m., as Fitzpatrick was approaching the third floor landing of the public hallway of the building, he saw the petitioner, Hugo DiPaolo, leaving apartment 3-C. The petitioner walked in his direction, observed the officer, then threw a brown steno pad to the floor and quickly retraced his steps back into the apartment. Fitzpatrick,

* All references, unless otherwise noted, are to petitioner's printed Appendix on appeal to the Court of Appeals.

an expert in "mutuel race horse policy" gambling,* picked up the pad (People's Exh. 1; 106) and observed "various policy notations" therein (23-26). He then forced in the door of the apartment before DiPaolo could close it and, once inside, arrested the petitioner and two other men who were not prosecuted. He searched the petitioner and found a driver's license bearing DiPaolo's name and address, 2465 Crotona Avenue. After Fitzpatrick advised the petitioner of his constitutional rights, the petitioner responded to his questions and told the officer his name, age and stated that the apartment was his (27-28, 53-56, 66-70). The advisement was given in the kitchen, wherein the officer also saw in plain view on the kitchen table 30 sheets of paper containing approximately 10,000 mutuel race horse policy plays (People's Exh. 2; 81-82), a brown paper bag containing nine unmarked envelopes, six of which housed slips of paper collectively representing approximately 75,000 mutuel race horse policy plays (People's Exhs. 3-8; 83, 86-87).

While in the apartment, Detective Hughes was followed by a barking dog, who he feared was going to bite him. "Who owns the dog?" he asked. "I do" petitioner answered. "Do you live here?" Hughes asked. "Yes I do," petitioner said. Then Hughes demanded: "Call off your dog" (Trial 408).

On May 27, 1969, the Grand Jury of Bronx County filed a four-count indictment against the petitioner, charging

* Mutuel race horse policy is a form of gambling where bets are placed on either one, two or three digit numbers, *i.e.*, single action, "bolito," or straight mutuel race horse policy, the winning number being usually determined by the outcome of individual horse races at a local track.

him with Promoting Gambling in the First and Second Degrees and Possession of Gambling Records in the First and Second Degrees. No motion to suppress evidence on unconstitutional grounds was made. The petitioner was brought to trial on November 23, 1970, wherein only two witnesses, Detectives Fitzpatrick and Hughes, gave testimony. The jury found him guilty of all four counts and on February 5, 1971, he was sentenced as indicated above.

ARGUMENT

POINT ONE

Petitioner's arrest and the seizure of evidence in the public hallway and in his apartment did not violate his constitutional rights.

Petitioner contends that he was arrested as a result of an unlawful invasion of privacy which included the seizing of personal property without an arrest or search warrant coupled with an unauthorized invasion of his dwelling.

Initially, we note that petitioner failed both before and in the course of his trial to make a motion to suppress the evidence to which he now belatedly objects. Under New York law he thereby waived his right to a judicial determination of the constitutional claim raised herein [former Code Crim. Proc. §813-d(4), now, Crim. Proc. Law Art. 710; *People* v. *Britton*, 26 A.D.2d 586, 271 N.Y.S.2d 1010 (1966), *cert. den.* 386 U.S. 935 (1966); *People* v. *McCall*, 19 A.D.2d 630, 241 N.Y.S.2d 439 (1963)]. No doubt realizing this, he did not even attempt to raise the question on his appeal to the Appellate Division or to the Court of Appeals. Moreover, it should also be noted that petitioner did not move

to amend the remittitur which application would clearly have shown that the New York appellate courts did not pass on this issue. Thus, he now raises it here for the first time. As this Court stated in the case of *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions" [see, *Crowell* v. *Randall*, 10 Pet. 368, 9 L.Ed. 458 (1836); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers' Ass'n, Inc.*, 260 U.S. 334 (1959)].

It would thus seem inappropriate on the record herein to discuss the merits of the seizure plaint. However, since petitioner has presented substantial argumentation on the claim, we nonetheless turn to its merits. In the first place, Detective Fitzpatrick's seizure of the steno pad that petitioner discarded in the public hallway outside his apartment was an indisputably proper exercise of his authority. It is settled that a police officer in the performance of his duties has a right to enter common passageways of multiple dwellings, and that evidence obtained therein without a search warrant is admissible in court [*Burks* v. *United States*, 287 F.2d 117 (9th Cir. 1961), *cert. den.* 369 U.S. 841 (1961); *United States* v. *Buchner*, 164 F.Supp. 836 (D.C. D.C. 1958), *aff'd* 268 F.2d 891 (D.C. Cir. 1958), *cert. den.* 359 U.S. 908 (1958); *People* v. *Adams*, 176 N.Y. 351 (1907); *People* v. *Garcia*, 49 Misc.2d 938, 126 N.Y.S. 2d 734 (1966)].

Secondly, under New York law, a policeman may arrest a person without a warrant if he has reasonable cause to believe that person committed a felony [Code Crim. Proc. 177(3); *People* v. *Russell*, 35 Misc. 765, 72 N.Y.S. 1 (1901), *aff'd* 67 A.D. 620, 74 N.Y.S. 1141 (1901), appeal dismissed

171 N.Y. 655, 63 N.E. 1120 (1901)]. Having perused the steno pad, which contained various policy notations, Detective Fitzpatrick, an expert qualified at trial in mutuel race horse policy, surely had such reasonable cause. Moreover, his entry into the apartment was justified on grounds of "hot pursuit" [see, *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970)].

Finally, once legally in the apartment, Detective Fitzpatrick was clearly within his rights in seizing the materials in plain view on the kitchen table. This Court stated in *Harris* v. *United States*, 390 U.S. 234, 236 (1967): "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence" [see, also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971)].

Thus, we respectfully submit that, aside from the fact that the issue is not properly before this Court, the record herein is barren of any evidence to support the claim.

POINT TWO

The trial court did not commit error by admitting petitioner's pedigree statement into evidence.

It will be recalled that after Detective Fitzpatrick placed petitioner under arrest in the apartment, the officer advised DiPaolo of his rights pursuant to *Miranda* v. *Arizona* [384 U.S. 436 (1966)]. Subsequent to the advisement, petitioner, in response to three questions, told Fitzpatrick his name, age and the fact that he resided in the apartment. It will be further recalled that while the officers were in his apart-

ment, Detective Hughes had occasion to ask petitioner to restrain his barking dog which animal was following the officer about the premises. In the course of that incident Detective Hughes felt constrained to ask petitioner whether he lived in the apartment. DiPaolo answered in the affirmative at which point Hughes ordered him to "call off" the dog.

Petitioner contends that his utterance to Detective Fitzpatrick relative to his tenancy in the apartment should not have been admitted into evidence despite the administration of *Miranda* warnings since the record is devoid of any facts demonstrative of a knowing waiver of the pertinent rights on his part. Seemingly, petitioner has no quarrel with the later statement uttered to Detective Hughes.

At the outset, we note that although petitioner was given pre-trial notice of the prosecution's intention to utilize his statement to Fitzpatrick against him at trial, he did not request a pre-trial hearing to have a judicial determination of the issues attendant to the *Miranda* decision [see, former Code of Crim. Proc., §813-f, now Crim. Proc. Law Art. 710; see also *Jackson* v. *Denno*, 378 U.S. 368 (1964); *People* v. *Huntley*, 15 N.Y.2d 72, 225 N.Y.S.2d 838 (1965)]. We suggest then that petitioner waived his right to a judicial determination of the *Miranda* plaint raised herein. However, it should be noted that the petitioner was accorded a hearing during the trial to judicially determine whether he had been advised of his rights; and, eventually the voluntariness of the pertinent statement was submitted to the jury. Interestingly enough petitioner's only objection to the reception of the statement into the evidence was to the clarity and precision of the advisements (121-122) and

not to the wholly distinct issue—one of waiver—raised in the New York appellate courts and now before this Court. Thus, we have all along contended and we adhere to that position that DiPaolo failed to preserve for appeal the claim of an unknowing and unintelligible waiver of his constitutional rights [see, *People* v. *Vidal*, 26 N.Y.2d 249, 254, 309 N.Y.S.2d 336 (1970); *People* v. *Murphy*, 135 N.Y. 450, 455 (1892); *Richardson on Evidence*, §543 (Prince, 9th Ed. 1964)].

Turning to the merits of the *Miranda* plaint, we consider it significant that petitioner's statement was in answer to a question regarding pedigree. In *Farley* v. *United States*, 381 F.2d 357 (5th Cir. 1967), *cert. den.* 389 U.S. 942 (1967), it was held that *Miranda* should not be so strictly construed as to exclude the answers to such questions, since the information is otherwise so readily obtainable [see, also, *People* v. *Ryff*, 27 N.Y.2d 707, 314 N.Y.S.2d 17 (1971); *People* v. *Rivera*, 26 N.Y.2d 304, 310 N.Y.S.2d 287 (1970)].

In any event, petitioner who had had an extensive criminal involvement with the law—this fact is *dehors* the trial record (312-313), answered the question while in his own apartment and in the company of two friends. Since there is no indication in the trial transcript that he did not understand the *Miranda* warnings—indeed, had counsel voiced the proper objection, a record on this issue would have been generated—the statement was knowingly and intelligently made.

Finally, we submit that it was not in any case necessary for the People to show that petitioner owned the apartment in order to prove that he possessed the gam-

bling records therein. At trial the People established that the steno pad discarded by petitioner in the public hallway outside the apartment was the master record for the collectors' slips found in the apartment. The nexus between the exhibits was further confirmed by the fact that the steno pad contained the envelopes in which the collectors' slips for the day of the arrest would have been deposited. Thus, the exhibits themselves, at the least, created the reasonable inference that petitioner possessed them within the meaning of the statute at the time of the arrest. In addition to this evidence, the People showed that the banker of a policy operation would have to have exclusive possession of all the records (157-168), and that defendant was arrested in the "policy bank." Therefore, there was more than sufficient evidence, without petitioner's pedigree statement, to show that he possessed the gambling records found in his apartment.

Furthermore, petitioner's later statement to Detective Hughes (when his dog was barking at the officer) that the apartment belonged to him was free of whatever taint may have attached to the earlier pedigree statement.

POINT THREE

The statements of the prosecutor did not deprive petitioner of a fair trial.

During the course of the People's summation, the assistant district attorney made the following comments:

> "Now gentlemen, I am not going to come here and moralize to you about the evils of gambling. But I think that you people now have had an experience and

exposure and a little more knowledge than you did when you first took your respective seats in this jury box. The opportunity of hearing from experts, experienced detectives, exactly what organized race horse politics is. Its scope. What it involves. And what does it involve?

"It involves little people, everyday people, humble people. Dimes and quarters, with the hope that they will hit the winning number. And those are the people, often poor people, apparently who are being killed in a police operation, because the chances, the better's chances are a thousand-to-one of winning. What does he get in return? Five hundred. Five hundred. Fifty-to-one. What better is it the gambler? For the money down. The odds are against him but he is gambling.

"Mr. Williams is no gambler. He is a business man. The police game is a business. The odds are all in his favor. He wins everyday.

"What is the effect of this? These individuals are being killed for those nickels and dimes and quarters everyday that this thing runs. And all that money coming in from these individuals is money coming from the most disadvantaged neighborhood in New York, Bronx County. And where is all the money going? It's going to schools? Is it going to schools? Is it going to hospitals? Is it going to [illegible]

"Mr. Cannizzaro: Judge, I must object because I don't know whether that's fair comment.

"The Court: Overruled.

"Mr. Cannizzaro: Exception.

"Mr. Wolf: Is it going to give relief to the people that need it the most? Of course it isn't going into the pockets of all the officials in Bronx County. What's it going?

[illegible]

er's bank. Within this evidentiary framework, the aforesaid utterances of the prosecutor cannot, we submit, be fairly deemed to have connected petitioner to a wider criminal network.

With respect to petitioner's complaint relating to the prosecutor's remarks about the effects of the policy operation on the poor and their community, we simply note that the evidence supported these comments. Thus the jury had already been informed of the massive odds against a player in the policy scheme (263-265). Similarly it had been told that the payoff on a winning number was far less than the odds of hitting the number (*id.*). In truth, then, the player in petitioner's illicit game was, in the language of the prosecutor, being "bilked." Moreover, it is common knowledge, and, therefore, should have come as no surprise to the veniremen, that the patrons of policy games are usually the poor who of necessity must live in disadvantaged communities [see, *e.g.*, *People* v. *Gillson*, 109 N.Y. 389 (1888)]. Indeed, the prosecutor was merely reminding the jury that the Legislature had a legitimate end in mind when it proscribed petitioner's conduct, and the relevant statements should be considered a rational effort on the part of the prosecutor to place the so-called "victimless" crimes of gambling in their true perspective, so as to guard against the possibility that the jury might substitute its own wisdom for that of the Legislature.

Petitioner also contends that the prosecutor's comment regarding the yearly gross business of the policy operation exceeded the scope of the indictment. We agree with the trial court that the pertinent evidence was admissible on

the basis of defense counsel's cross-examination of Detective Hughes. Hughes was asked to form an opinion as to the period encompassed in the mutuel race horse policy exhibits—a week—and the amount of money they represented—over $500 a day (108-109). Beyond that, the nature of the crimes charged implied an ongoing form of illicit activity and the jury itself could readily have estimated the yearly scope of the scheme since it had already been apprised of its daily intake. The felony possession count of the indictment recited all of the week's work seized in the apartment (6). Furthermore, the evidence was relevant to the question of motive [see, *People* v. *Fitzgerald*, 156 N.Y. 253, 259 (1898); *People* v. *Scott*, 153 N.Y. 40 (1897)].

As for the prosecutor's remark that no taxes are paid on the income of the policy scheme, surely this was nothing more than to state the obvious—gamblers do not declare their illegal earnings for tax purposes—and was not in the least prejudicial to the petitioner.

In closing we note that any prejudice that might have flowed from the prosecutor's comments was cured by appropriate jury instructions which were acceptable to petitioner (Proceedings 422, 424, 457; Charge 468). Indeed, New York's appellate courts have already ruled that these statements in the context of all the evidence did not deprive petitioner of a fair trial. Parenthetically it should be noted that the tribunals of that state are particularly sensitive to claims involving prosecutorial misconduct [see, *People* v. *DiPaolo*, 37 A.D.2d 823 (1971), *aff'd* 30 N.Y.2d 962 (1972)]. Therefore, we respectfully submit that any error committed was harmless in light of the overwhelm-

ing proof of petitioner's guilt [*Chapman* v. *California*, 386 U.S. 18 (1967); *People* v. *Schwartzman*, 24 N.Y.2d 241, 251, 299 N.Y.S.2d 817 (1969); Code of Crim. Proc. 542, now Crim. Proc. Law §470.05(1)].

POINT FOUR

The charge was free of reversible error.

After the trial court instructed the jury on the applicable principles of law and marshaled the evidence, the jury twice returned from its deliberations unable to reach a verdict, and a third attempt at deliberation was interrupted for a dinner recess. Before the jury was permitted to leave the courtroom, the judge made the following statement:

> "Sit down. Now gentlemen, we are going to come back here at 8:30 and we are going to continue working. And I'm going to tell you very frankly, this is the simplest case I've ever tried since I've been sitting in the Supreme Court. Either you believe Hughes and Fitzpatrick and believe that the People have proven their case beyond areasonable doubt or you don't believe it. It's just that simple. It's a two day trial. There haven't been a lot of witnesses here. There is not a lot of involved exhibits. It's a very simple case, one way or the other, depending upon whether or not you believe the People have proved their case.
>
> Now if the People have proven their case beyond a rasonable doubt, you have a right to bring in a verdict against this defendant. If the People have not proven their case beyond areasonable doubt, and you do not believe Hughes of Fitzpatrick, then you have a duty to acquit this defendant.

So we are going to do to dinner, come back and we are going to continue working. All right, you are excused for dinner.

Do not discuss the case among yourselves during the recess and do not form any opinion during the time you are out for dinner" (299-300).

After dinner the jury resumed its deliberations. Thirty-five minutes later, at the request of the foreman, the court repeated its instructions on the law for the first and third counts of the indictment (301). Thereafter the jury reached its verdict.

Petitioner claims that the court committed reversible error with respect to the jury instruction quoted above. He argues that the cahrge over-simplified the law on reasonable doubt and, in effect, removed several issues from the province of the jury.

Initially, we note that petitioner did not take exception to the charge, nor did he make a request for instructions. This failure precluded him from raising the objection on appeal to the Court of Appeals [Code Crim. Proc. §420-a; *People* v. *Reynolds*, 25 N.Y.2d 489, 307 N.Y.S.2d 201 (1969); *People* v. *Baker*, 23 N.Y.2d 307, 296 N.Y.S.2d 475 (1968); *People* v. *Simons*, 22 N.Y.2d 533, 293 N.Y.S.2d 521 (1968); *People* v. *Regina*, 19 N.Y.2d 65, 277 N.Y.S.2d 683 (1966); *People* v. *Cohen*, 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959)]. It has been held by this Court on numerous occasions that a litigant must follow state procedures in raising a federal question and that, when required by state practice, the federal question must be raised before the trial court [*Williams* v. *Georgia*, 349 U.S. 375 (1950); *Brown* v. *Massachusetts*, 144 U.S. 573 (1891)]. If reasonable state procedural

requirements are not observed, as in the instant case, the court will decline to exercise jurisdiction [*Ferguson* v. *Georgia*, 365 U.S. 570 (1960); *In re Lamkin*, 355 U.S. 59 (1957)].

The trial court previously gave the jury a thorough and lucid charge on the question of reasonable doubt. In addition, the learned judge carefully outlined the factual elements required to be proved for each of the crimes and marshaled the evidence (250-284). The statement to which petitioner objects served only to remind the jury that its duty was to determine whether or not the People met their burden and nothing more. Since the People's case rested in large part on the credibility of the two detectives—witness defense counsel's summation—defendant should not be heard to complain about a charge that emphasized that issue. As to the learned judge's personal view of the case —"This is the simplest case I've ever tried since I've been sitting in the Supreme Court"—we note that he did not express any opinion as to the guilt or innocence of the defendant. Moreover, we consider it significant that the jury, after the judge's statement, did not hasten to a verdict, but in fact made a request for further specific instructions.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

October, 1972